

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

LISA DURBIN HOWARD v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Bradley County
No. 06-460 Carroll L. Ross, Judge**

No. E2009-01135-CCA-R3-PC - Filed February 16, 2010

The Petitioner, Lisa Durbin Howard, appeals from the post-conviction court's order denying her petition for post-conviction relief. The State has filed a motion requesting that this court affirm the trial court's order pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Following our review, the State's motion is granted and the judgment of the post-conviction court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, J.J., joined.

Charles Richard, District Public Defender; and Larry D. Wright, for the appellant, Lisa Durbin Howard.

Robert E. Cooper, Attorney General and Reporter; Renee W. Turner, Senior Counsel; Robert Steve Bebb, District Attorney General; and A. Wayne Carter, Assistant District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

The Petitioner was convicted by a jury of first degree premeditated murder and was sentenced to life imprisonment. Her conviction was affirmed on direct appeal by this court, holding that the issues raised were waived because her motion for a new trial was untimely. State v. Lisa Durbin Howard, No. E2005-00112-CCA-R3-CD, 2005 WL 2922364, at *2 (Tenn. Crim. App. Nov. 4, 2005), perm. app. denied, (Tenn. March. 27, 2006). The Petitioner filed a petition for post-conviction relief and was granted permission to pursue a delayed appeal. This court affirmed the judgment of the trial court. State v. Lisa Durbin

Howard, No. E2007-00178-CCA-R3-PC, 2008 WL 1805758, at *23 (Tenn. Crim. App. Apr. 22, 2008), perm. app. denied, (Tenn. Oct. 27, 2008). The Petitioner's petition for post-conviction relief was "revived" by order of the trial court, and following an evidentiary hearing on the remaining issue of ineffective assistance of counsel, the post-conviction court denied her petition for post-conviction relief. This timely appeal followed.

The Petitioner argues that trial counsel was ineffective for failing to obtain a second opinion regarding the Petitioner's mental state because trial counsel was aware that "[e]xpert testimony to establish that [the Petitioner] suffered from post traumatic stress disorder was essential to [the] self-defense argument." The State argues that the Petitioner's claim must fail because she failed to offer any expert testimony to show that she was unable to form the requisite culpable mental state.

At trial, the Petitioner called Dr. David Solovey to negate the State's proof that the Petitioner was able to form the requisite culpable mental state for first degree murder. However, Dr. Solovey's testimony and reports did not support the Petitioner's contention that she was suffering from a mental disease or defect and was unable to form the requisite mental state. Consequently, his reports were deemed inadmissible at trial and on appeal.

The proof at the evidentiary hearing consisted solely of the testimony of trial counsel and the Petitioner. According to trial counsel, "[I]t probably would have been better if [he] had moved to continue the case to try to, you know, find another expert and get a second opinion." The Petitioner stated that trial counsel did not discuss the possibility of getting a second opinion regarding her mental health at the time of the victim's death. The Petitioner stated, "I just feel that I, I believe I could have got a fair trial and treatment if I would have had an expert testify in my behalf."

In denying her petition for post-conviction relief, the post-conviction court stated,

I don't think I can find somebody deficient in representation based on some just wild speculation, 'Well, there might have been some doctor out there that could have found the test that would show what we wish this test had shown, but that doctor didn't find it.' So I'm going to rule that that does not rise to the level of being [ineffective] representation of counsel, and I'm going to dismiss her petition here.

The burden in a post-conviction proceeding is on the petitioner to prove her allegations of fact supporting her grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact

unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The Petitioner and trial counsel were the only witnesses who testified at the post-conviction hearing. Our court has long held that "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We cannot speculate as to what another expert witness may have said or presented in a medical report. Id. Hence, the Petitioner has not established that trial counsel's performance was deficient.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the post-conviction court's denial of the petition for post-conviction relief was appropriate. Accordingly, we grant the State's motion for an affirmance pursuant to Rule 20 of the Court of Criminal Appeals because this opinion does not have any precedential value. The judgment of the post-conviction court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

D. KELLY THOMAS, JR., JUDGE